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No. 99-1010

In the Supreme Court of the United States

BIG D ENTERPRISES, INC. AND EDWIN G. DOOLEY,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. A jury found that petitioners, a multi-millionaire apartment owner and his wholly-owned management company, engaged in a pattern or practice of denying rental apartments to black prospective applicants and specifically denied an apartment to one victim because her biracial son would be living with her, in violation of the Fair Housing Act of 1968, 42 U.S.C. 3601 *et seq.* The jury awarded each set of victims $500 in compensatory damages and $25,000 in punitive damages against each defendant. The question presented is whether the punitive damages award violates due process.

2. Whether punitive damages under the Fair Housing Act of 1968 should be assessed pursuant to federal or state law.

3. Whether the court erred in denying a mixed motive jury instruction when the court found insufficient evidence of an alternative, legitimate basis for denying a black apartment seeker an apartment to rent.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. a1-a29) is reported at 184 F.3d 924.

JURISDICTION

The judgment of the court of appeals (Pet. App. a30-a31) was entered on July 9, 1999. A petition for rehearing was denied on September 10, 1999 (Pet. App. a32-a33). The petition for a writ of certiorari was filed on December 9, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On March 14, 1997, the United States filed a complaint against petitioners Big D Enterprises, Inc., (Big D) and Edwin G. Dooley, the president and sole share-

holder of Big D, alleging violations of the Fair Housing Act of 1968, 42 U.S.C. 3601 *et seq.* See Pet. App. a3; 11 F. Supp. 2d 1047, 1048 (W.D. Ark. 1998). Dooley owns three apartment buildings in Fort Smith, Arkansas: Oak Manor, Park Terrace, and Village South. See Pet App. a3; 11 F. Supp. 2d at 1048. Big D manages apartment rentals at the three buildings. See Pet. App. a3; 11 F. Supp. 2d at 1048. The United States alleged that petitioners engaged in a pattern or practice of discrimination in denying rental apartments to blacks, 42 U.S.C. 3614(a), and discriminated specifically against Cynthia Williams on the basis of race, 42 U.S.C. 3604, 3612(o). The United States sought injunctive relief and compensatory and punitive damages for Williams and other identified victims. See 11 F. Supp. 2d at 1049.[1]

At trial, several former Big D employees testified to petitioners' pattern of discriminatory treatment of black apartment seekers. Pet. App. a8. Former apartment managers testified that they repeatedly were instructed by Dooley, his former wife, Elizabeth Dooley, and his stepdaughter, Tricia Turner, not to rent to blacks, and that the managers implemented that policy by lying about apartment availability and by failing to consider applications from black apartment seekers. *Id.* at a8-a9. Apartment managers also testified that they were chastised when, on rare occasions, they did rent to black applicants. *Id.* at a8. Moreover, apartment managers and other former Big D em-

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[1] Carol Ragan, a former employee of Big D, and Oak Manor Apartments were also initially named as defendants. Before trial, the United States and Ragan entered into a consent decree. Oak Manor Apartments was later removed from the caption at the United States' request because it is not an independent legal entity.

ployees testified that Dooley and other senior managers referred to black applicants as "niggers." *Id.* at a8-a9.

In addition, Carol Ragan, one of Big D's former property managers, testified that Turner specifically instructed her not to rent an available apartment to Williams because Williams' son is biracial and her former husband is black. Pet. App. a11. Ragan further testified that Turner instructed her not to rent an available apartment to Janet Poole and Richard Batts because they are black. *Id.* at a10.

After a four-day trial, a jury awarded Williams and her minor son, collectively, $500 in compensatory damages, $25,000 in punitive damages against Big D, and $25,000 in punitive damages against Dooley. Pet. App. a1-a2. The jury also awarded Batts and Poole, collectively, $500 in compensatory damages, $25,000 in punitive damages against Big D, and $25,000 in punitive damages against Dooley. *Id.* at a2. The district court denied Big D's motion for judgment as a matter of law, new trial, or remittitur of damages. See 11 F. Supp. 2d at 1054.

The court of appeals affirmed. Pet. App. a1-a29. The court first rejected petitioners' challenge to the sufficiency of the evidence. The court concluded that the United States presented "overwhelming evidence" (*id.* at a12) that "conclusively demonstrated" (*id.* at a11) that petitioners engaged in a pattern and practice of denying black prospective applicants, on the basis of race, the opportunity to rent apartments.

The court of appeals also held that the district court properly rejected petitioners' request for a mixed motive jury instruction. Pet App. a13-a15. The court explained that "[s]ubmission of a mixed motive jury instruction is not warranted if a defendant has failed to present sufficient evidence of a legitimate motive for

the adverse action." *Id.* at a14. Petitioners argued that deficiencies in the housing applications submitted by Williams and by Poole and Batts justified a mixed motive instruction. The court held that petitioners failed to present evidence that deficiencies in Williams' application "contributed to her rejection" for the apartment. *Id.* at a14-a15. It also held that petitioners failed to raise the issue of Poole and Batts' application in the district court and could not raise it for the first time on appeal. *Id.* at a13 n.2.

The court of appeals also upheld the jury's award of punitive damages. Pet. App. a17-a21. First, the court rejected petitioners' assertion that Arkansas law, rather than federal law, governed the measure of punitive damages. *Id.* at a16. The court reasoned that interpreting the Fair Housing Act's anti-discrimination provisions pursuant to state law would lead to "inconsistent results between the states" and would "thwart the even-handed application" of the Act's provisions. *Ibid.* Thus, the court upheld, consistent with federal law, the admissibility of each defendant's financial worth as relevant to determining the amount of punitive damages. *Id.* at a17.

Finally, the court rejected petitioners' claim that the amount of punitive damages violated due process. Pet. App. a21. The court explained that there is no single, mathematical formula to assess the appropriateness of an award of punitive damages, and that the ratio of punitive damages to compensatory damages is only one of several factors to consider when reviewing a jury's punitive damages award. *Id.* at a18-a19. The reprehensibility of a defendant's conduct and how the punitive damages award compares to other possible sanctions are not only independently significant factors in the assessment of damages but also "naturally

impact[] upon the acceptability of the punitive to compensatory damage award ratio." *Id.* at a19. If those two other factors suggest that a high level of punitive damages is appropriate, then a high ratio, even one as high as 526 to 1, which this Court approved in *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443, 459-462 (1993), is appropriate. In contrast, if the conduct in issue is not reprehensible and the award significantly exceeds other possible penalties, then a ratio of 4 to 1 or lower may be more appropriate. Pet. App. a19.

Applying those principles, the court of appeals found that the Fair Housing Act of 1968, 42 U.S.C. 3614(d)(1)(c), which allows civil penalties up to $50,000 for a first violation, is consistent with the jury's award. Pet. App. a19-a20. The court noted that the district court specifically declined to impose civil penalties in light of the punitive damages award. *Id.* at a20. The court of appeals also reasoned that describing petitioners' conduct as "egregious may be an understatement" given their "systematic and deliberate exclusion of an entire race of people." *Ibid.* The court of appeals therefore concluded that the ratio of punitive to compensatory damages was not disproportionate, and the punitive damages award did not violate due process. *Id.* at a21.[2]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. The application by the court of appeals of settled principles of law to the facts of this

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[2] The court also rejected several additional claims that petitioners have not raised in this petition. Pet. App. a23-a29.

case does not raise any important issue of federal law. Accordingly, the petition should be denied.

1. a. Petitioners mistakenly contend (Pet. 11-19) that the court of appeals erred in affirming the award of $100,000 in punitive damages, which they assert was so great in proportion to the $1,000 in compensatory damages that it violated their due process rights. Applying this Court's precedents, the court of appeals correctly upheld the punitive damages award.

As the court of appeals explained, this Court has identified three primary factors that a reviewing court should consider when determining whether a punitive damages award is so excessive that it violates due process: (1) the degree of reprehensibility of a defendant's conduct, (2) the ratio between the actual *and* potential harm and the size of the award, and (3) the availability of comparable sanctions. See *BMW of N. Amer., Inc.* v. *Gore*, 517 U.S. 559, 575 (1996) (emphasis added). Thus, "the ratio of compensatory to punitive damages * * * is simply one factor that a court must consider when evaluating whether a punitive damage award violates due process." Pet. App. a18. Moreover, there is no "mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable [ratio] that would fit every case." *BMW*, 517 U.S. at 583 (citing *TXO Prod. Corp.* v. *Alliance Resources Corp.* 509 U.S. 443, 458 (1993)); see also *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 21-22 (1991).

> [L]ow awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in

> cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine.

BMW, 517 U.S. at 582. Moreover, as the court of appeals explained, the other two factors, reprehensibility and comparative sanctions, influence how high a punitive to compensatory damages ratio is acceptable. Pet. App. a19.

Indeed, this Court has stated that "[p]erhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *BMW*, 517 U.S. at 575. "[E]vidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful would provide relevant support for an argument that strong medicine is required to cure the defendant's disrespect for the law." *Id.* at 576-577.[3] Here, petitioners engaged in deliberate and repeated discriminatory acts in violation of a statute enacted more than 25 years ago.

Moreover, under 42 U.S.C. 3614(d)(1)(c), the district court could have imposed civil penalties of $50,000 on each of petitioners, an amount identical to the jury's punitive damages award. As the court of appeals noted, the district court expressly declined to impose civil penalties because the jury had assessed punitive damages. Pet. App. a20. The fact that petitioners were liable under the statute for alternative sanctions com-

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[3] In assessing reprehensibility, this Court examines the nature of the injury, the extent to which the defendant engaged in repeated, unlawful behavior, the presence (or absence) of a "safe harbor," the presence of bad faith, and the presence of misconduct either through "deliberate false statements * * * or concealment of evidence of improper motive." *BMW*, 517 U.S. at 575-579.

parable to the punitive damages award not only suggests that the award was not disproportionate but also allays any concern that they did not receive "fair notice * * * of the penalty" (Pet. 9, 16 (quoting *BMW*, 517 U.S. at 574)) that they might face.

Finally, this case epitomizes a situation in which a high ratio between compensatory and punitive damages is appropriate. Here, as in most cases of racial discrimination in housing, repeated acts of intentional discrimination caused minimal economic injury to individuals, but have grave societal costs. See Robert G. Schwemm, *Housing Discrimination: Law and Litigation* § 25.3(2)(b), at 25-18 (1995). Beyond the harm that petitioners' pattern and practice of discrimination inflicted on the identified victims, it posed potential harm to other unnamed blacks that Big D managers may have rejected through lies or failure to consider their applications. Moreover, the jury could reasonably consider the need to deter not only Big D and Dooley, but others in similar business positions. See Pet. App. a18-a21; *Dean* v. *Olibas*, 129 F.3d 1001, 1007 (8th Cir. 1997); 11 F. Supp. 2d at 1054. Because housing discrimination can be practiced by subtle means that are difficult to detect, when a pattern of discrimination has been proved strong measures are appropriate to punish the discrimination and to deter future violations.

b. Contrary to petitioners' assertions (Pet. 11-19), the decision of the court of appeals does not conflict with any decision of this Court, any other decision of the Eighth Circuit, or any decision of another court of appeals. As we have explained above, the determination whether an award of punitive damages is excessive requires a fact-specific analysis in each case. Thus, petitioners' comparisons of the amount of punitive damages awarded here with awards in other cases,

particularly cases involving violations of other statutes, cannot in themselves demonstrate any conflict among decisions. For example, although in one circumstance, this Court stated that a 4 to 1 ratio of punitive damages to compensatory relief "may be close to the line," see *Haslip*, 499 U.S. at 23, the Court has upheld ratios of 10 to 1 for potential harm, and 526 to 1 for actual harm, see *TXO*, 509 U.S. at 459-462. Further, reviewing courts' assessments or reductions of awards in contexts very different from the case at bar, or based on different legal standards, have little or no bearing on whether the jury's award here violates due process. See, *e.g.*, *Kimzey* v. *Wal-Mart Stores, Inc.*, 107 F.3d 568, 576-577 (8th Cir. 1997) (punitive damages award in employment case reduced in light of Missouri law, which considers aggravating and mitigating circumstances); *Patterson* v. *PHP Healthcare Corp.*, 90 F.3d 927, 942-943 (7th Cir. 1996) (remand of punitive damages award in employment discrimination case), cert. denied, 519 U.S. 1091 (1997).

Petitioners have cited no case in which a court of appeals reduced a punitive damages award for victims of racial discrimination in housing because it was excessive and violated due process. Indeed, the court's affirmance of the jury's award is consistent with other housing discrimination cases. See, *e.g.*, *Littlefield* v. *McGuffey*, 954 F.2d 1337, 1349 (7th Cir. 1992) (intentional, racial discrimination against renter and subsequent harassment, including death threats, supported $100,000 punitive damages award); *Phillips* v. *Hunter Trails Community Ass'n*, 685 F.2d 184, 191 (7th Cir. 1982) ($50,000 punitive damages award *each* to a husband and wife, who were denied opportunity to purchase home, upheld due to "ample evidence of intentional disregard" of plaintiffs' civil rights). Accordingly,

the Eighth Circuit's affirmance of the jury's award is correct and consistent with other judicial decisions.

2. Petitioners also assert (Pet. 25-28) that punitive damages under the Fair Housing Act of 1968 (FHA) should be assessed pursuant to Arkansas rather than federal law, and, therefore, the jury's consideration of petitioners' wealth was improper because it was forbidden by state law as unduly prejudicial. The district court and court of appeals correctly rejected that contention. See Pet. App. a16-a17; 11 F. Supp. 2d at 1052. That ruling accords with the decisions of other courts of appeals and does not warrant this Court's review.[4]

When a cause of action arises out of a federal statute, federal law governs the scope of the available remedy. See *Burnett* v. *Grattan*, 468 U.S. 42, 55 & n.18 (1984); *F.D. Rich Co.* v. *Industrial Lumber Co.*, 417 U.S. 116, 127 (1974). Accordingly, federal law controls damages determinations for a federal cause of action. See, *e.g.*, *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, 238-240 (1969). Although state law may sometimes be incorporated into federal law as the federal rule of decision, the court of appeals here determined, in accordance with this Court's precedent, that incorporation of the law of individual states would frustrate the need for a uniform national standard. Pet. App. a16 (citing

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[4] Moreover, petitioners' claim is not properly before this Court because they did not raise it in a timely manner in the district court. At trial, petitioners objected to the introduction of their respective financial worth solely on the ground that the United States had not made out a prima facie case of either defendant's liability for punitive damages. 3 Tr. 694-695. Petitioners did not contend until their motion for a new trial or remittitur that evidence regarding the wealth of joint tortfeasors is prohibited under state law as unduly prejudicial.

Kamen v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98 (1991)).

Applying federal law, the court of appeals correctly held that a defendant's financial worth is admissible to evaluate the amount of punitive damages. See *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 270 & n.31 (1981). Thus, the district court appropriately admitted evidence of petitioners' financial worth. The jury was properly instructed, and it assessed punitive damages separately against Big D and Dooley based on the specific circumstances of each defendant. 4 Tr. 1148-1150, 1161-1162. See *McFadden* v. *Sanchez*, 710 F.2d 907, 912-914 & n.6 (2d Cir.), cert. denied, 464 U.S. 961 (1983).

Petitioners have cited no authority that supports their contention that a punitive damages award under the Fair Housing Act should not be governed by federal law because the Act does not contain specific criteria for awarding punitive damages. Indeed, that claim is inconsistent with decisions of those courts of appeals that have reviewed punitive damage awards under the Fair Housing Act of 1968. See, *e.g.*, *Ragin* v. *Harry Macklowe Real Estate Co.*, 6 F.3d 898, 909 (2d Cir. 1993); *United States* v. *Balistrieri*, 981 F.2d 916, 936 (7th Cir. 1992), cert. denied, 510 U.S. 812 (1993); *Littlefield*, 954 F.2d at 1345, 1349; *Asbury* v. *Brougham*, 866 F.2d 1276, 1283 (10th Cir. 1989); *Hunter Trails*, 685 F.2d at 191; see also Schwemm, *supra*, § 25.3(3)(b), at 25-35 to 25-38.

3. Finally, petitioners contend (Pet. 20-24) that the district court erred in denying a "mixed motive" jury instruction because they presented evidence of an alternative reason for denying Ms. Williams' application. Petitioners' objection raises only a factual dispute with the lower courts' evaluation of the evidence, and it

presents no issue of general importance warranting this Court's review.

The district court and court of appeals correctly determined that petitioners failed to present evidence that supported a "mixed motive" instruction. The court of appeals noted that "no witness corroborated appellants' allegation that deficiencies in Williams' application contributed to her rejection." Pet. App. a15. The court concluded, consistent with the decisions of this Court, that "[a]ppellants' naked assertion without more is not sufficient evidence of a legally permissible motive." *Ibid.* Cf. *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 255 n.9 (1981) (A presumption established by a prima facie case is not rebutted by "[a]n articulation not admitted into evidence[.] Thus, the defendant cannot meet its burden merely * * * by argument of counsel").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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